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Asia Tax Bulletin

Autumn 2022

In This Edition

We are pleased to present the Autumn 2022 edition of our firm's *Asia Tax Bulletin*.

Dear Reader,

This edition of the Asia Tax Bulletin contains a host of topics on tax matters which have come up in Southeast Asia during the past few months. For the purpose of this note I would like to mention the fact that the Multilateral Tax Treaty (MLI) has now entered into force for both the PRC and Hong Kong and consequently their double tax treaties covered by the MLI are now subject to the agreed MLI anti-avoidance provisions. This may (inter alia) affect holding structures using Hong Kong holding companies which do not have a strong business purpose. Hong Kong has enacted new tax facilities for ship agents, ship brokers and ship managers in Hong Kong. We would also like to draw your attention to the Korean tax reform proposals announced recently, which are scheduled to take effect on 1 January 2023, which will a.o. reduce the corporate tax rate, facilitate the possibility for Korean companies to earn tax exempt foreign dividend income and enhancements of the ability to claim foreign tax credits. Malaysia has issued the exemption orders which stipulate the condition that foreign income remitted to Malaysia will be taxable unless it concerns dividends which are paid by a foreign company based in a country whose headline income tax rate is at least 15%. I would like to end this note with Thailand, which has now signed up to the multilateral treaty to exchange financial account information (CRS).

We trust you will find the contents worth reading and please do not hesitate to contact your regular contact at Mayer Brown if you have any questions.

Pieter de Ridder

Contents

JURISDICTION:

China (PRC)

Tax Relief to Residents of Hong Kong and Macao Working in Nan Sha

The State Taxation Administration Bureau of Guangdong Province issued a notice announcing the implementation of Circular of the Ministry of Finance and the State Taxation Administration [2022] No. 29, which grants preferential individual income tax treatment to residents of Hong Kong and Macau working in Nan Sha of Guangdong Province. The Circular applies from 1 January 2022 to 31 December 2026.

Individuals are exempt from paying the portion of individual income tax that exceeds their individual income tax burden in Hong Kong and Macau respectively. China's individual income tax rates are progressive and can go up to 45% whereas Hong Kong's salaries tax is capped at 15%.

Income eligible for the exemption includes comprehensive income (consisting of wages and salaries, income from personal services, author's remuneration and royalties), business income and subsidies for recruitment of talents recognized by the local government.

Multilateral Tax Treaty (MLI)

On 1 September 2022, the Multilateral Tax Treaty (MLI) entered into force in the PRC. The PRC signed the convention on 7 June 2017 and deposited its final MLI Position on 25 May 2022, including the 100 tax treaties that it wishes to be covered by the MLI.

Tax Exemption for New Energy Vehicles

New energy vehicles purchased in the period from 1 January 2023 to 31 December 2023 will continue to be exempt from vehicle purchase tax. As with the current incentive, the eligible vehicles must be listed in the "Catalogue of Vehicles Purchase Tax Exempt Types of Vehicles" and includes full electric cars, hybrid plug-in cars and fuel cell cars.

The extension of this tax incentive was announced in Public Notice of the Ministry of Finance, the State Taxation Administration and the Ministry of Industry and Information [2022] No. 27 issued on 18 September 2022. The exemption was due to expire on 31 December 2022 and is intended to stimulate the use of new energy cars and car purchases in general. The tax relief amounts to 10% of the taxable price (normally the purchase price excluding VAT).

Tax Reliefs for Technology and R&D

High-new technology enterprises may deduct the amount of investment in equipment or tools on a one-off basis in the same tax year and receive a super-deduction of 100% (an additional deduction on top of the actual cost) if such equipment or tools are purchased in the period from 1 October to 31 December 2022. All high-new technology enterprises qualified as such in the fourth quarter of 2022 are entitled to enjoy this one-off deduction and super-deduction. Any amounts not deducted may be carried over to the following years. For the purposes of this announcement, the equipment or tools covered are fixed assets, with the exception of housing properties and buildings. High-new technology enterprises will be defined and qualified according to the Guo Ke Fa Hou [2016] No. 32. In addition, the super-deduction of 75% for R&D activities currently enjoyed by enterprises will be increased to 100% in the period from 1 October to 31 December 2022. To calculate the super-deduction for the fourth quarter, enterprises may use the actual R&D costs and expenses incurred in the fourth quarter or pro-rate the total annual R&D costs and expenses. These new tax deductions are laid down in the Announcement of the Ministry of Finance and the State Taxation Administration [2022] No. 28.

JURISDICTION:

Hong Kong

Shipping Tax Concession

The government has gazetted the Inland Revenue (Amendment) (Tax Concessions for Certain Shipping-related Activities) Ordinance 2022, providing half-rate profit tax concessions (i.e. at a rate of 8.25%) to qualifying shipping commercial principals (i.e. ship agents, ship managers and ship brokers). The tax concessions apply to sums received by or accrued to shipping commercial principals on or after 1 April 2022.

Under the Ordinance, the profits derived by a qualifying shipping commercial principal from carrying out a qualifying activity for an associated shipping enterprise that is entitled to a concessionary tax rate or income exemption will be subject to the same concessionary tax rate or income exemption as that applicable to the associated shipping enterprise. The Ordinance has incorporated anti-abuse provisions to safeguard the integrity of the tax system and comply with the latest international tax rules.

Multilateral Tax Treaty (MLI)

On 1 September 2022, the Multilateral Tax Treaty (MLI) entered into force in Hong Kong. It signed the convention on 7 June 2017 and deposited its final MLI Position on 25 May 2022, including the 39 tax treaties that it wishes to be covered by the MLI.

Hong Kong Defers Pillar 2 Implementation

In a letter to stakeholders including multinational enterprises and business chambers on the implementation of Pillar Two in Hong Kong, the Secretary for Financial Services and the Treasury confirmed that in view of the OECD'S latest timetable on the implementation of Pillar Two and the implementation plans of other jurisdictions, Hong Kong has decided to defer the implementation of the Income Inclusion Rule (IIR) to 2024 at the earliest. As for the implementation of the Undertaxed Payment Rule (UTPR) and by extension the proposed domestic minimum top-up tax (DMT), Hong Kong will review its own plan with reference to the implementation targets of other jurisdictions.

Previously, it had been announced in the 2022/23 Budget that Hong Kong planned to submit a legislative proposal to the Legislative Council in the second half of 2022 to implement the global minimum tax rate and other relevant requirements in accordance with international consensus, and to consider introducing a DMT starting from the year of assessment 2024/25 to ensure that the effective tax rates of in-scope MNEs reach the global minimum effective tax rate.

With the benefit of the Implementation Framework for the GloBE Rules under Pillar Two, which is scheduled to be released by the OECD later this year, Hong Kong plans to launch a consultation exercise towards the end of 2022 to gauge stakeholders' views on how best to translate the OECD rules into domestic legislation and the relevant requirements for the purpose of implementing BEPS 2.0 in Hong Kong.

Share Awards Taxable Despite Being Forfeitable

On 22 July 2022, the Court of Appeal (COA) handed down its judgement on *Richard Paul Mark Aidan Forlee v Commissioner of Inland Revenue (CIR).* This appeal, brought by the CIR, concerns whether or not (i) certain forfeitable shares which were awarded to Richard Paul Mark Aidan Forlee (the taxpayer) previously during his overseas employment but which ceased to be forfeitable during his subsequent Hong Kong employment within the same group, and (ii) certain dividends received by the taxpayer on those shares, are assessable to salaries tax. The COA ruled that it was the Board of Review's (the Board) error to focus on when the shares ceased to be subject to forfeiture, instead of when the taxpayer became entitled to claim payment of the shares.

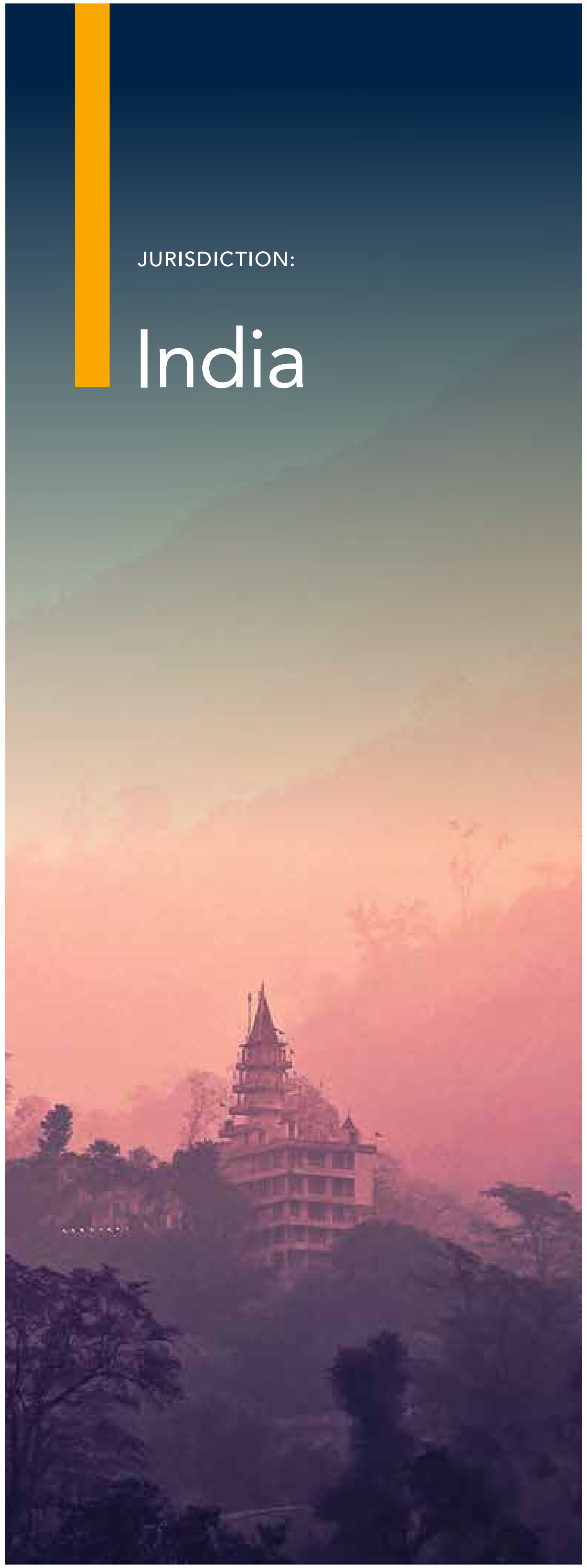
Although the shares were subject to forfeiture and clawback up to a specified date called the 'Release Date' and restriction on transfer until the end of a further period called the 'Retention Period', they did not prevent them from being a 'perquisite' and therefore income. On this basis, the COA held that the shares were accrued to the taxpayer when awarded and not income from the taxpayer's employment in Hong Kong. Similarly, the dividends received by the taxpayer as a result of the shares awarded to him by virtue of his overseas employment are not taxable for salaries tax purposes.

Are Company Directors Liable for Penalties in the Event Of Incorrect Profits Tax Returns?

The Court of Final Appeal (CFA) handed down its judgment on *The Commissioner of Inland Revenue (CIR) v. Koo Ming Kown and Murakami Tadao* on 5 August 2022. The case concerns whether additional (penalty) tax assessments can be issued by the Inland Revenue Department (IRD) to the directors of a company who sign the company's profits tax returns filed with the IRD, when such returns are regarded by the IRD as incorrect. The CFA unanimously dismissed the CIR's appeal and upheld the decisions of the lower courts that the company's profits tax returns were required to be made, and were made, by the company itself and not by the directors on behalf of the company, and hence the directors could not be made liable to the additional (penalty) tax imposed for filing incorrect returns of the company.

Stamp Duty Relief for UK LLP

The District Court (DC) handed down its judgment on John Wiley & Sons UK2 LLP and another v. The Collector of Stamp Revenue on 15 July 2022. The case concerns whether the appellants (being the transferor and transferee) were entitled to stamp duty relief under section 45 of the Stamp Duty Ordinance (SDO) in respect of an intragroup transfer of shares in a Hong Kong company. The only point in dispute is whether the membership interest in a UK limited liability partnership (LLP) is 'issued share capital' for the purpose of section 45 of the SDO. The DC allowed the appellant's appeal and held that the membership interest in a UK LLP is 'issued share capital' within the meaning of section 45 of the SDO, and the appellants were therefore 'associated bodies corporate' within the meaning thereof and entitled to the stamp duty relief. The Collector of Stamp Revenue (the Collector) may or may not appeal to the Court of Appeal.



JURISDICTION:

India

Interest Withholding Tax

The Delhi bench of the Income-tax Appellate Tribunal (Tribunal) has held that a beneficial tax rate of 5% prescribed under section 194LD read with section 115(A)(1)(a)(iiab) of the Income-tax Act, 1961 (the Act) shall be available on interest income earned from investments made in rupee denominated non-convertible debentures (NCD).

The non-resident taxpayer invested in rupee denominated NCD of Indian companies and earned interest income thereon. The said interest income was offered to tax, applying the tax rate of 5% as per 194LD read with section 115A(1)(a)(iiab) of the Act. The Tax Officer (TO) held that section 194LD of the Act is applicable only when interest is earned on rupee denominated bonds. In the instant case, the taxpayer had earned interest on NCD. Hence, section 194LD of the Act will not be applicable and the taxpayer shall be liable to pay tax as per the rate mentioned in Article 11 of the India–Germany Double Taxation Avoidance Agreement, which is 10%.

The issue before the Tribunal was whether 'debenture' should be considered as 'bond' for the purpose of section 194LD of the Act?

The issue is covered in favour of the taxpayer by the decision of the jurisdictional Delhi High Court wherein, while discussing the issue on the specified modes of investment under section 11(5) of the Act, the court held that, in absence of a definition of the term 'debenture' under the Act, reliance may be placed upon the definition provided under the Companies Act 1956. As per the Companies Act 1956, 'bond' is covered under the expression 'debenture'. The exposition of the jurisdictional High Court on the term 'debenture' should prevail over the meaning provided by the Revenue.

The ruling provides relief to specified non-resident taxpayers from being charged at a higher rate of tax on interest earned on rupee denominated debentures. The ruling follows the principles laid down by higher appellate authorities that, in the absence of the definition of the term given under the Act, meaning has to be derived from the definition provided under other regulations and also as understood in common parlance. The proviso to section 194LD of the Act provides that the rate of interest on rupee denominated bond shall not exceed the rate notified by the Central Government. Applicability of the said proviso on NCDs remains unaddressed.

Deductions of Surcharge or Cess

The Finance Act, 2022, had overturned various High Court decisions1 on the allowability of surcharge and/ or education cess by making a retrospective amendment under section 40(a)(ii) of the Income-tax Act, 1961 (the Act). To give effect to this amendment, the Central Board of Direct Taxes (CBDT) has inserted Rule 132 in the Income-tax Rules, 1962 (the Rules), and prescribed Forms through a Notification to provide the procedure required to be followed by the taxpayers and Tax Officers (TOs) to recompute income under sub-section (18) of section 155 of the Act.

The Finance Act, 2022, with retrospective effect (assessment year 2005–2006 and onwards), has introduced an Explanation to section 40(a)(ii) of the Act to bring in a clarification that the term 'tax' includes and will always deemed to have included any surcharge and cess, by whatever name called, on such tax. In effect, the claim of surcharge or cess will be considered income-tax and should not be allowed as a deduction while computing the income chargeable under the heads 'profits and gains of business or profession'.

Sub-section (18) has been inserted in section 155 of the Act, providing that –

- The deduction in respect of any surcharge or cess, claimed and allowed in case of a taxpayer in any previous year, will be deemed to be under-reported income for the purpose of section 270A(3) of the Act irrespective of section 270A(6) of the Act, except in case where application is being filed by the taxpayer for recomputation of total income in the prescribed form and within the prescribed time;
- The TO is required to recompute the total income of the taxpayer for such previous year by making necessary amendments; and
- The provisions of section 154(7) of the Act with regard to the time limit of four years will be reckoned from the end of the previous year commencing on the first day of April 2021.

To implement the aforesaid provisions, the CBDT has notified rule 132 along with various Forms, providing the mechanism for withdrawal of surcharge or cess, subsequent recomputation of income and payment of taxes (if any).

The key points of the CBDT notification are the following:

- Taxpayer to file an application requesting recomputation of total income of the relevant previous year without allowing the claim of deduction of surcharge or cess in Form 69 electronically on or before 31 March 2023;
- TO, on receipt of such application, will recompute the total income by amending the relevant order and issue notice under section 156 of the Act for the relevant years specifying the time period for payment of tax if any, and for the subsequent years if the order for such year results in variation in carry forward of loss or allowance for unabsorbed depreciation or credit for tax under sections 115JAA or 115JD of the Act; and
- The taxpayer will furnish the details of payment of taxes in Form No. 70 to the TO within a period of 30 days from the date of making the payment.

The notification issued by the CBDT has put to rest the uncertainties faced by the taxpayers around the filing of application for recomputation of the total income of the year without allowing the claim for deduction of surcharge or cess.

JURISDICTION:

Indonesia

Tax Identification Number

On 8 July 2022, the Minister of Finance (MoF) issued a Regulation No.PMK-1121 which regulates the change in approach to the use of Taxpayer Identification Numbers (Nomor Pokok Wajib Pajak/NPWP) for Individuals, Corporates and Government Agencies. PMK-112 serves as one of many implementing regulations of the Harmonisation of Tax Regulations (Harmonisasi Peraturan Perpajakan/HPP) Law which governed the change in use of a separate NPWP for an individual taxpayer who is a resident of Indonesia.

Under the new rules, taxpayers that reside in Indonesia should start using their Residential Identity Number (Nomor Induk Kependudukan/ NIK) as a Tax ID instead of the previously used NPWP. Some highlights of PMK-112 are as follows:

Taxpayers who already have NIK

Starting from 14 July 2022, an Individual taxpayer who is Resident (Penduduk) in Indonesia should use their NIK in place of their NPWP. For Individual taxpayers who already have 15-digit-NPWP before this PMK takes effect (i.e. before 8 July 2022), the Directorate General of Taxes (DGT) will activate the NIK as the new Tax ID based on the taxpayer registration application or by ex-officio means. The term Resident referred to in PMK-112 includes Indonesian Citizens and Foreigners residing in Indonesia (and have an NIK). This definition appears to be in line with Law-24 3 which stipulates that all residents will be given a NIK, including foreigners residing in Indonesia. With the use of NIK instead of a separate NPWP, the DGT can match the identity data with population data at the Directorate General of Population and Civil Registration (Ministry of Home Affairs).

The results of the data matching will produce valid data (already matched) or invalid data (not matched with population data). In case of invalid data, the DGT will submit a request for clarification of invalid data (such as data on email address, residential address, etc.) prompting the taxpayer to amend the data as requested. The use of NIK in place of NPWP has commenced on 14 July 2022 if the NIK data is a matching result, or in case of invalid data once the data have been changed to the valid data, which is then notified to the taxpayer. If the taxpayer does not change the data (invalid status), the taxpayer can only use the 15-digit-NPWP up to 31 December 2023 for tax administration services and administration of other parties which require NPWP. PMK-112 stipulates that starting from 1 January 2024, the taxpayer must use NIK instead of NPWP in all tax administration services and with other parties' services.

Taxpayers that do not use NIK

With effect from 14 July 2022, taxpayers who do not have a NIK (i.e. Non-resident individuals, Corporate and Government agency taxpayers) will use a new 16-digit-NPWP (to make the digit number match with those using 16 digit NIK instead of the NPWP).

The DGT will provide a 16-digit-NPWP for new taxpayers who register themselves for an NPWP or are given an NPWP by ex-officio after 8 July 2022. For taxpayers (that will not use NIK) with an existing 15-digit NPWP, the DGT will provide a 16-digit-format based on the taxpayer registration application. The 16-digit-NPWP is created by simply adding the number 0 (zero) in front of the existing 15-digit-NPWP. In transitioning to the 16-digit-NPWP, the DGT may ask for clarifications from this group of taxpayers (such as email address, Classification of Business Fields (Klasifikasi Lapangan Usaha) data, etc.), and then the taxpayer should submit a response in the form of approval (if the data is appropriate) or correction (if the data does not match with the actual condition). In addition, if the tax administration and other administrations have not been able to accommodate the new 16-digit-NPWP, the taxpayers above can still use the existing 15-digit-NPWP until 31 December 2023. Starting from 1 January 2024, the taxpayers must use the new 16-digit-NPWP format in tax administration services and other parties' services.

The branch taxpayer

In the future, the DGT will provide a separate Identity Number for branches of companies that is different from an NPWP (currently such branches are issued separate NPWP). The new Identity Number for a separate Place of Business Activities (Nomor Identitas Tempat Kegiatan Usaha/NITKU) for the branch taxpayers who already had an NPWP before 8 July 2022. The Branch NPWP may still be used for the exercise of rights and fulfilment of tax obligations until 31 December 2023. The DGT will provide branch NPWP and NITKU for the new branch taxpayer who register themselves to be given an NPWP or are given an NPWP by exofficio within the period 8 July 2022 – 31 December 2023. TaxFlash I Page 3 of 4 Starting from 1 January 2024, the branch taxpayer uses only the NITKU as the identity of the place of business activity that is separate from the place of main registered head office (which will continue to use NPWP).

VAT Invoices

On 4 August 2022, the Directorate General of Taxes (DGT) issued Regulation No.PER-11 to amend PER-032 regarding Value-Added Tax (VAT) Invoices. Under PER-11, the use of the delivery address (instead of the centralised PKP address) is only applicable for the delivery of Taxable Goods (Barang Kena Pajak) or Taxable Services (Jasa Kena Pajak) to a buyer located in a "Certain Area" (kawasan tertentu atau tempat tertentu) which is eligible to enjoy the Non-Collection of the VAT and Luxury Goods Sales Tax (LST) facility. This rule is only applicable for VAT Invoicing to centralised PKPs administered by the Large Taxpayer, Special Jakarta and the Medium Tax Services Offices.

A Certain Area consists of (i) a Bonded Stockpiling Area, (ii) a Special Economic Zone or (iii) other areas governed by Non-Collection of VAT and LST arrangements. A Certain Area does not cover a Free Trade Zone where VAT centralisation is not allowed. For transactions that do not fall under the above scenario, the VAT Invoicing mechanism continues to follow the general rules. PER-11 took effect on 1 September 2022. VAT Invoices issued to a centralised PKP between 1 April – 31 August 2022 and which has applied the provisions of PER-03 are still considered valid as long as the Invoices continue to fulfil the general requirements for crediting Input VAT.

JURISDICTION:

Japan

Changes to the Anti Tax Avoidance Rule

The Anti-Tax Avoidance Rule (or the 'Rule') was enacted as an anti-tax avoidance measure in 2020, under which a corporate taxpayer (Japanese parent company) is required to reduce its basis in its subsidiary's shares after receiving dividends from that subsidiary, to prevent the taxpayer from generating losses on the subsequent transfer of that subsidiary. Japan's tax reform for 2022 (the '2022 Tax Reform') increased the scope of certain exceptions to the application of the Rule; specifically, regarding (i) the calculation of retained earnings as of a specified control date and (ii) application of the '10-year holding period' exception to controlled subsidiaries that have received dividends from second- or lower-tier subsidiaries or that have carried out a merger or spin-off within intragroup subsidiaries. The 2022 Tax Reform Act was approved in the Diet on March 22, 2022 and related Enforcement Orders and Regulations as well as the 2022 Tax Reform Act were promulgated on March 31, 2022. The revised statutes of the Anti-Tax Avoidance Rule (provided in the Corporate Tax Law Enforcement Order) entered into force on April 1, 2022 and apply retroactively with regard to dividends received by taxpayers in fiscal years commencing on or after April 1, 2020. Foreign companies with a Japanese affiliate should be aware of the Rule prior to undertaking a restructuring or to the Japanese affiliate receiving dividends from a lower-tier subsidiary.

Invoicing and Consumption Tax

There are cases where taxpayers providing taxable supplies in Japan might issue invoices that show prices in a foreign currency. For example, the Japanese subsidiary of a US manufacturer may issue invoices to its Japanese customers in USD, for products that the Japanese subsidiary sells to those customers in Japan. Under current rules, a purchaser may use such a foreign currency invoice to support a Japanese Consumption Tax ('JCT') input credit in its JCT returns. The Japanese tax authorities have released an update to the official 'Q&A', however, in which they clarify that under the new Qualified Invoice Issuer ('QII') rules coming into effect from October 1, 2023, a taxpayer must show the JCT portion in a Qualified Invoice ('QI') in JPY, even if the transaction between buyer and seller is undertaken in a foreign currency. If the seller does not do so, the invoice will not be considered a proper QI. New rounding rules will also apply to QIs issued in a foreign currency.

Tax Reform Proposals 2022

The Ministry of Economy and Finance (MOEF) announced on July 21, 2022 the government's legislative changes to amend a series of tax laws including the corporation tax law ('the Reform Bill'). The Reform Bill includes measures aimed at enhancing corporate competitiveness, expanding tax support to facilitate corporate investment and job creation, revitalizing capital markets, expanding tax revenue sources to enhance public finance sustainability and easing the tax burden of low and middle-income families. To help enhance the competitiveness of domestic companies, the Reform Bill would provide a three percentage point reduction in the top marginal corporate income tax rate and, in the same context, abolish the existing 20% additional tax on excess corporate earnings reserves. Regarding wage and salary income, the Reform Bill aims to reduce the tax burden on individuals by adjusting individual income tax brackets. Also, the Reform Bill includes legislative proposals to adopt global minimum tax rules in January 2024 which are aligned with the Global Anti-Base Erosion Model Rules (Pillar Two) released by the Organization for Economic Cooperation and Development (OECD) in December 2021. The proposals are estimated to result in a KRW13.1 trillion decline in annual tax revenue including a KRW2.5 trillion decline in individual income tax revenue and a KRW6.8 trillion decline in corporate income tax revenue. If approved by the National Assembly, most of the proposed changes will become effective January 1, 2023. The following discusses a number of topics covered by the proposed tax reform.

Under the Reform Bill, the top marginal corporate income tax rate would be lowered from 25% to 22% and the income tax base brackets would be simplified.

The Reform Bill would introduce Dividend Received Deduction (DRD) rules applicable to dividends received by a domestic company from its foreign subsidiary. Currently, a domestic company would have to include such dividends in its taxable income, subject to a normal corporate income tax rate while it may claim a foreign tax credit for foreign tax paid by the foreign subsidiary to the extent of a deduction limit. Under the Reform Bill, the new DRD rules, rather than the existing foreign tax credit rules, would apply to dividends received from a qualifying foreign subsidiary where (i) a domestic company has owned at least 10% of the shares or interest in the foreign subsidiary for at least six months prior to the dividend record date (5% for a foreign subsidiary carrying on an overseas natural resources development business; no shareholding threshold is required for dividends through a reduction of capital reserve of the foreign subsidiary); and (ii) the dividends received from the foreign subsidiary fall within the scope of "qualifying dividends" which includes dividends from profits, distributions from earnings reserves and certain deemed dividends under the Corporate Income Tax Law (CITL). Note that deemed dividends from undistributed earnings under the Korean controlled foreign company (CFC) rules, deemed dividends derived from hybrid financial instruments (from which income is treated as an interest payment in a foreign jurisdiction but is treated as deemed dividends in Korea) and dividends from certain indirect investment vehicles (excluding private equity funds for institutional investors) would be excluded from the scope of qualifying dividends eligible for the DRD. The DRD rate will be 95% of the dividend received, or deemed to be received, by the domestic company. With respect to dividends received before December 31, 2022 (including foreign tax credits carried forward due to a deduction limit), the existing foreign tax credit rules will continue to apply.

There will be a relaxation of criteria for foreign subsidiary eligibility for indirect foreign tax credits. The scope of qualifying foreign subsidiaries eligible for an indirect foreign tax credit is currently limited to those foreign subsidiaries where a domestic parent has been directly holding at least 25% of the shares or interest in the foreign subsidiary for at least six months prior to the dividend declaration date (i.e., the date on which dividend payment is approved at the shareholders' meeting) of the foreign subsidiary. Under the Reform Bill, to be aligned with the foreign subsidiary shareholding requirement for the DRD, the 25% threshold would be lowered to 10% and the six-month period begins from the dividend record date with respect to qualifying foreign subsidiaries eligible for indirect foreign tax credits. There will be no change in the 5% threshold applied to foreign subsidiaries carrying on overseas natural resources development business.

The government proposes a rationalization of the DRD regime for dividends from domestic subsidiaries. Currently, the dividend received deduction (DRD) ownership ratios differ depending on the type of corporation (i.e., holding company vs. other companies; and listed subsidiaries *vs.* unlisted subsidiaries) and the ownership percentage held by a company in its domestic subsidiary paying a dividend. The DRD regime would be rationalized and aligned with the international standards as follows: i) 100% deduction for dividends received from a domestic subsidiary in which the dividend receiving company has at least 50% ownership; ii) 80% deduction in the case where the ownership is at least 30% but less than 50%; and iii) 30% deduction in the case where the ownership is less than 30%. The proposed DRD would be applicable to dividends received on or after January 1, 2023. For dividends received in 2023 and 2024, the dividend receiving company would be allowed to choose to apply the existing or a new DRD regime.

There will be an increased limit for the deduction of tax losses carried forward. Under the Reform Bill, the deduction limit that companies are allowed to deduct losses carried forward from taxable income would increase to 80% from 60% of taxable income for the respective year, whereas the deduction limit for SMEs remains unchanged at 100% of taxable income.

Expiration of additional taxation on excess corporate earnings reserves. The existing sunset provision on the 20% additional tax on excess corporate earnings reserves, which was designed to facilitate the use of corporate retained earnings to fund facility investment and payroll increases, would expire as scheduled at the end of December 2022. Even after the sunset, the additional taxation will still apply to the excess corporate earnings reserves already created and carried forward before the sunset.

The Reform Bill includes a package of legislative proposals for global minimum tax rules. The government's proposals are aligned with the Global

Anti-Base Erosion Model Rules (Pillar Two) released by the OECD in December 2021. Under the government's legislative proposals, where an MNE group (subject to the global minimum tax rules) is liable for an effective tax rate which is below the 15% minimum rate in a particular jurisdiction, a constituent entity in Korean may be liable to pay a corporate income tax in an amount equal to its allocable share of the top-up tax of the low-taxed constituent entity in Korea for a fiscal year. The Government aims to implement the proposed rules in January 2024. The proposed rules would apply to constituent entities (with exceptions) that are members of a multinational enterprise (MNE) group that has annual revenue of EUR 750 million or more in the consolidated financial statements of the ultimate parent entity in at least two of the four fiscal years immediately preceding the tested fiscal year. A domestic constituent entity, that is the ultimate parent entity of an MNE Group, located in Korea would be primarily responsible for paying tax. As an exception, a partially-owned intermediate parent entity where more than 10% interest is directly and indirectly held by a third party outside the group, etc. might be liable for paying tax. A domestic constituent entity, where applicable, would be obligated to pay as corporate income tax an additional top up tax allocated in accordance with the income inclusion rule (IIR), etc. as detailed in the LCITA.

The Reform Bill proposes several changes to the controlled foreign company (CFC) regime. Currently, the undistributed earnings of a CFC located in a low-tax jurisdiction with an average effective income tax rate (as determined under the LCITA) equal to or less than 70% of the top marginal corporate income tax rate of 25% at present (i.e.,17.5%) are taxed as deemed dividends to the Korean resident shareholder owning the CFC if certain requirements are met. As the top marginal corporate income tax rate would be lowered from 25% to 22% under the Reform Bill, the effective tax rate for the purpose of applying the CFC rules would be lowered to 15.4% from 17.5% accordingly. Presently, the CFC rules do not apply in cases where a foreign subsidiary has fixed facilities (e.g., office, factory) in a low-tax jurisdiction for the conduct of business, it manages or controls the business by itself, and the business is mainly performed in the jurisdiction. Even in this case, however, where passive income (e.g., income arising from stocks or bonds held by a CFC) accounts for more than 5% of gross income of the CFC, the CFC rules shall be applicable. In calculating the amount of passive income, gain or loss from the sale of ships, aircraft, and equipment directly used in a CFC's business is currently excluded. In this context, the Reform Bill would additionally exclude gains or losses derived from the disposal of stocks and bonds held by a CFC for the conduct of its business in a financial or insurance industry sector in calculating the passive income.

Finally, the government proposes a change to application procedures for treaty exemption. To claim withholding tax exemption under an applicable tax treaty, a non-resident or a foreign corporation which is a substantive owner of Korean source income is required to provide the payor of income with an application form for an income tax treaty exemption, together with the residence certificate attached. The payor of such income must file those documents with the Korean tax authorities. In connection with this, it would be required to provide additional documents relating to the incorporation of a foreign corporation, business and domestic source income of a non-resident or a foreign corporation. In addition, the Reform Bill would allow the head of a district tax office to make a decision or correction in the event of failure to meet requirements for claiming treaty benefits or inconsistency between the description claimed and the facts. The head of tax office would make a decision/correction if the requirements for nontaxation, etc. are not complied with or the contents of the application are different from the facts. If it is infeasible to determine whether the requirements are met, the head of a district tax office may request the supplementation of documents, while the payor would be able to request a non-resident or a foreign corporation to provide supplementary documents.

JURISDICTION:

Malaysia

Foreign Source Income Exemption

Following the announcement by the Malaysian Government on 31 December 2021 of a 5-year deferment of income tax on foreign sourced dividend income brought into Malaysia by companies and limited liability partnerships and all types of foreign sourced income brought into Malaysia by individuals, the following subsidiary legislation to give effect to these exemptions were gazetted on 19 July 2022:

- Income Tax (Exemption) (No. 5) Order 2022 [P.U.(A) 234/2022] ("E.O.5/22"); and
- Income Tax (Exemption) (No. 6) Order 2022 [P.U.(A) 235/2022] ("E.O.6/22").

Both E.O.5/22 and E.O.6/22 are deemed to have effect from 1 January 2022 until 31 December 2026.

E.O.5/22 exempts a qualifying individual from the payment of income tax in respect of his gross income from all sources of income (excluding a source of income from a partnership business in Malaysia) received in Malaysia from outside Malaysia in a basis period for a year of assessment. The exemption is subject to the condition that the foreign sourced income has been subjected to tax of a similar character to income tax under the law of the territory where the income arises.

For the purposes of E.O.5/22: "qualifying individual" means an individual resident in Malaysia and has income received in Malaysia from outside Malaysia; and"income received in Malaysia from outside Malaysia" means income arising from outside Malaysia which is brought into Malaysia.

From the above, it is to be noted that the exemption under E.O.5/22 shall not apply to each of the following:

- foreign sourced income that has not been subjected to tax similar to income tax in the source jurisdiction; and

- foreign sourced income that is derived from a partnership business in Malaysia.

E.O.6/22 exempts a qualifying person from the payment of income tax in respect of the gross income of that qualifying person from dividend income received in Malaysia from outside Malaysia in a basis period for a year of assessment.

The exemption under E.O.6/22 is subject to the following conditions:

- the dividend income has been subjected to tax of a similar character to income tax under the law of the territory where the income arises; and
- the highest rate of tax of a similar character to income tax charged under the law of the territory where the income arises at that time is not less than 15%.

E.O.6/22 does not apply to a person carrying on the business of banking, insurance, or sea or air transport.

For the purposes of E.O.6/22: "qualifying person" means a person resident in Malaysia who is:

(a) an individual who has dividend income received in Malaysia from outside Malaysia in relation to a partnership business in Malaysia;

(b) a limited liability partnership registered under the Limited Liability Partnerships Act 2012; or

(c) a company incorporated or registered under the Companies Act 2016; and

"dividend income received in Malaysia from outside Malaysia" means dividend income arising from outside Malaysia which is brought into Malaysia.

From the above, it is to be noted that the exemption under E.O.6/22 shall not apply to each of the following:

- a person carrying on the business of banking, insurance, or sea or air transport;
- foreign sourced dividend income that has not been subjected to tax similar to income tax in the source jurisdiction; and
- foreign sourced dividend income that has been subjected to tax similar to income tax in the source jurisdiction but the highest rate of such tax in the source jurisdiction is less than 15%.

Digital Currency Transactions

Courtesy IBFD it was reported that the Inland Revenue Board (IRB) has issued guidelines on the tax treatment of digital currency transactions (the guidelines) that provide guidance on, among others, the general tax treatment of acquisitions and disposals of digital currencies. The guidelines also provide guidance on tax treatment for specific transactions involving digital currencies such as the use of digital currencies in business and investment in digital currencies.

- Digital currency transactions in Malaysia are subject to tax under section 3 of the Income Tax Act 1967 where income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia is taxable.
- The IRB considers transactions involving digital currency would be subject to tax if the key activities and business operations are performed in Malaysia or if the business has presence in Malaysia.
- A person who actively trades digital currencies may be viewed as generating revenue from the activity which is taxable. On the other hand, gains derived by an individual who trades occasionally may be viewed as capital gains that are not subject to tax.
- The IRB will apply the badges of trade (in Appendix A of the guidelines) to determine whether the gain from a digital currency transaction is a capital or revenue gain.

Use of digital currencies in business

- Profits derived from the trading of digital currencies in the ordinary course of business are taxable similar to the trading of stock. Any expenses incurred in the production of taxable income or losses incurred from the trading activity would be tax deductible.
- Profits derived from mining of digital currencies with a profit-seeking motive are taxable. Expenses relating to the business are tax deductible and losses will be allowed.
- A business that accepts digital currency as a mode of payment should consider the digital currencies received as payment for goods or services provided, as sales to the business based on the open market value of the goods or services in Malaysian Ringgit (MYR).
- Salary and wages paid using digital currency is deductible to the employer and taxable in the hands of the employee based on the value of the services performed in the employment contract.

Investment in digital currencies

- Investments in digital currencies and digital tokens are considered as a business activity of that person if the investments activities are continuous, systematic, active, carry a financial risk and aim at making a profit. The taxability of a profit from the investment depends on whether the gain is capital or revenue in nature.
- The purchase of digital currencies such as Bitcoin and Ether, merely as part or full payments of any goods or services will not give rise to taxation.
- Digital currencies received for free as a marketing tool or the splitting of existing digital currency are not taxable at the time of receipt. However, the gains from the future disposal of the digital currencies may be taxable if the gains are revenue in nature.

Acquisition cost of digital currency

- The acquisition cost of digital currencies must be in MYR and is determined using the First-In, First-Out principle, unless the taxpayer is able to prove otherwise.
- The fair value of the digital currency received with no published value is equal to the fair value of the property or services exchanged for the digital currency when the transaction occurs.
- Records that need to be kept in relation to digital currency include the records to determine the nature of transaction, date of transaction and exchange records.
- Examples are provided in the guidelines.

For the purpose of the guidelines, digital currencies and digital token refers to digital financial assets that are based on distributed ledger technology and cryptographically secured digital representations of value or contractual rights that can be electronically transferred, stored or traded.

Certain digital Payment Services Exempt from Service Tax

The Royal Malaysian Customs Department has issued Service Tax Policy 1/2022 regarding the exemption from service tax of digital payment services rendered by local non-bank service providers with effect from 1 August 2022 until 31 July 2025.

- The Minister of Finance exempts the recipients of digital payment services provided by local non-bank service providers, from paying service tax.
- Following the above exemption, the following local non-bank digital payment service providers are exempted from levying service tax on digital payment services:
  - local non-bank payment instrument issuers;
  - local non-bank merchant acquirers; and
  - local non-bank payment system operators.
- The exemption does not apply to:
  - digital payment services rendered by foreign service providers; and
  - digital services other than digital payment services provided by local non-bank digital service providers as mentioned above.

Tax Losses

The Inland Revenue Board (IRB) has issued a public ruling clarifying the time limit, which is capped at 10 consecutive years of assessment (YAs), for taxpayers to carry forward unutilized or unabsorbed adjusted business losses arising from a particular YA.

In this regard, the IRB has issued Public Ruling No. 1/2022 (Time Limit for Unabsorbed Adjusted Business Losses Carried Forward) (PR 1/2022) of 30 June 2022.

JURISDICTION:

Philippines

Digital Economy Taxation

In his first State of the Nation address, the new president of the Philippines announced reforms will be made to the tax system "in order to catch up with the rapid developments of the digital economy, including the imposition of value added tax on digital service providers". Tax compliance procedures will also be simplified to promote the ease of paying taxes, and the Bureau of Customs will promote streamlined processes through information and communication technology.

Measures imposing VAT on the digital economy and facilitating ease of paying taxes were introduced during former president's term. However, they were not passed into law by the end of his term.

Invoices/Receipts

The Bureau of Internal Revenue (BIR) has removed the 5-year validity period for invoices and receipts issued for tax purposes, and issued guidelines on the mandatory issuance of electronic invoices for exporters, e-commerce businesses and taxpayers under the jurisdiction of the Large Taxpayers Service.

Mutual Agreement Procedure and Tax Rulings Exchange

The Bureau of Internal Revenue (BIR) has issued two revenue regulations (RRs) on 8 July with effect from 22 July 2022 prescribing the guidelines and procedures for requesting mutual agreement procedure (MAP) assistance and for the spontaneous exchange of tax rulings.

RR 10-2022 outlines the procedure for initiating a MAP request, the documentation and information required from the taxpayer, the timeframe within which the taxpayer may make a request and the venue where a request can be filed. Information regarding the MAP process and the implementation of a MAP agreement where an agreement is reached, or domestic remedies that a taxpayer may pursue where no resolution is reached, are also discussed.

Separate guidelines will be issued for advance pricing arrangements (APAs) negotiated through a mutual agreement procedure.

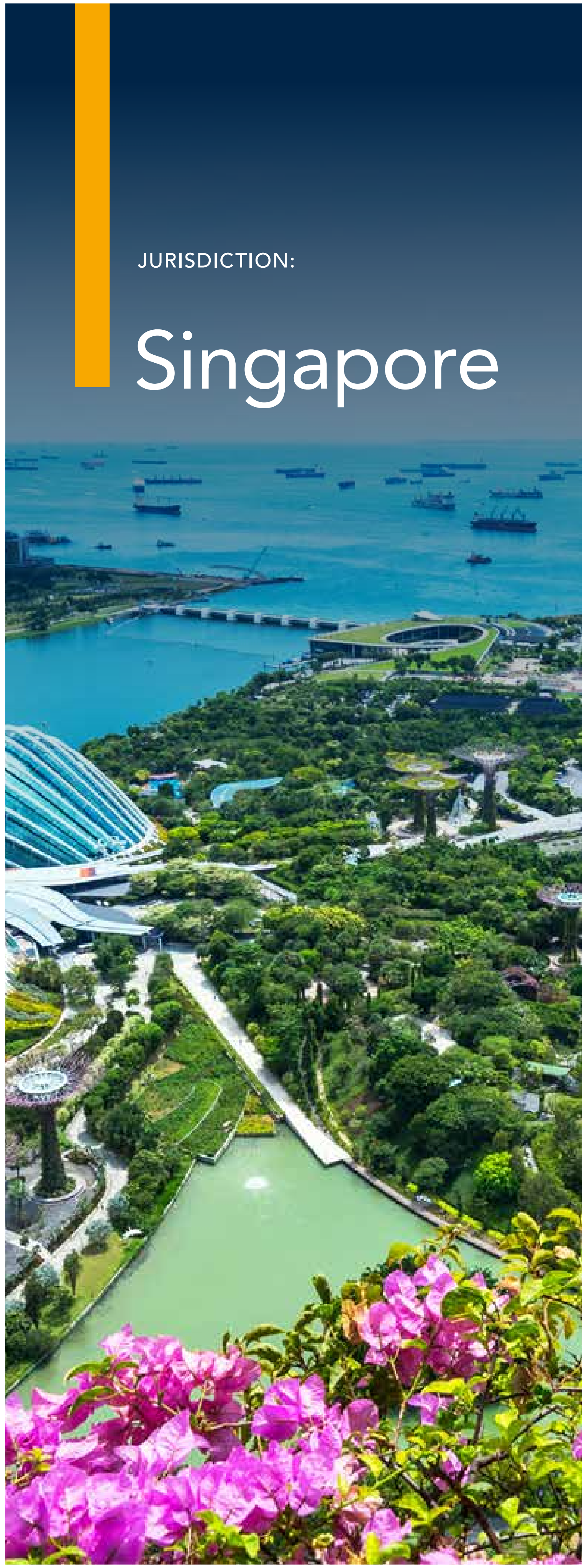
RR 11-2022 prescribes the guidelines and procedure for the spontaneous exchange of taxpayer-specific rulings (i.e. the transparency framework) pursuant to exchange of information provisions in tax treaties where the Philippines is a treaty partner. The scope of the transparency framework includes the following rulings:

- rulings relating to preferential regimes;
- unilateral APAs and other cross-border unilateral tax rulings (e.g. advance tax rulings) in respect of transfer pricing;
- cross-border rulings providing for a downward adjustment to taxable profits in the country that issued the ruling;
- permanent establishment rulings; and
- related party conduit rulings.

The International Tax Affairs Division, through the Exchange of Information section, shall be responsible for the implementation of the transparency framework.

JURISDICTION:

Singapore



Hybrid Securities

The Inland Revenue Authority of Singapore (IRAS) has published a summary of an advance ruling relating to the income tax classification of certain hybrid instruments as a result of certain subsequent amendments to the terms thereof pursuant to a proposed business acquisition. The hybrid instruments comprised of three tranches of subordinated perpetual securities (Series A, B and C Securities) issued under the issuer's multi-currency debt security issuance programme. The issuer had previously obtained rulings from the IRAS that: (1) each tranche of the securities would be treated as "debt securities" for the purposes of section 43H(4) of the Income Tax Act 1947 (ITA) and regulation 2 of the Income Tax (Qualifying Debt Securities) Regulations; and (2) any distributions payable on the securities would be regarded as interest payable on indebtedness under the ITA for deductibility purposes. In the present ruling, the IRAS ruled that some of the proposed changes to the terms of these securities were sufficiently material to affect the applicability of the previous rulings. However, the relevant tranche of securities would still qualify as "debt securities" and the distributions would still be regarded as interest payable on indebtedness for deductibility purposes.

Non-Monetary Consideration Under GST Act

On 6 June 2022, the Goods and Services Tax Board of Review ruled, in its decision in the case of *GEV v the Comptroller of Goods and Services Tax* [2022] SGGST 1, that the supply of certain nutritional and personal care products pursuant to a direct selling arrangement was partially made for non-monetary consideration and accordingly such supply should be valued based on its open market value (OMV) for Singapore goods and services tax (GST) purposes.

The Board decided that the supply of the products was partially made for "a consideration not wholly consisting of money" and the value of supply should therefore be based on its OMV. The Board stated its reasoning as follows:

- section 17(3) of the GST Act is intended to address a tax gap arising from a direct selling model where the supplier is GST-registered but the middlemen promoting and selling goods to end-consumers are not, which results in any mark-up in value along the supply chain to be non-taxable. The use of OMV (as opposed to transaction price) is intended to reflect the price paid by end consumers, which compels suppliers to incorporate the GST payable for the sale to end-consumers when determining the transaction price to the middlemen;
- a principal-agent relationship need not exist for section 17(3) of the GST Act to apply. The provision could also apply to arrangements between independent principals;
- on the question of what constitutes non-monetary consideration, the Board rejected the common law conception of "consideration" due to concerns that this could be "extremely broad" and proposed two touchstones for making such a determination (the Approach):
  - » first, the consideration must be independent of and not ancillary to the purchase, disposition or use of a good, such that the supplier receives a "separate or severable benefit from the transaction apart from the monetary transaction". Reasonable restrictions on the manner of sale, disposition or use of the discounted product do not have an independent economic value to the supplier separate from the monetary transaction from which they arise; and
  - » second, the contractual undertaking incurred by the recipient of supply should provide a benefit to the supplier that "goes beyond the monetary transaction", such as promises that: (i) promote sale of goods or services to other recipients of supply; (ii) impose behavioural or commercial constraints on the recipient of supply; (iii) grant exclusive rights of supply to the supplier; or (iv) ascribe rights or privileges to the supplier that are not related to the supply; and
  - » the Board eschewed the view that there were two "contracts" in such a transaction – one for supply of the products and another concerning the non-monetary obligations undertaken by a member in return for grant of membership – as there was "a direct causative and contractual link between the purchase by the Member of discounted price products and the various obligations undertaken to the [taxpayer] in the terms of Membership". Pertinently, the membership obligations and right to purchase discounted goods were set out in the same contractual documents and therefore formed part of the same transaction.

This case provided the Board with an opportunity to consider the applicability of section 17(3) of the GST Act to direct selling arrangements, and allowed it to introduce a novel test to ascertain whether consideration constituted "consideration not wholly consisting of money" for GST purposes. One of the potential challenges with the application of the Approach is determining whether certain restrictions or negative covenants imposed on a recipient of a supply should be considered a reasonable restriction (and therefore merely ancillary to the monetary transaction) or providing a benefit to the supplier that goes beyond the monetary transaction in question. The Board considered a covenant not to utilize social media to market the product as an example of a promise that provides a benefit to the supplier that goes beyond the monetary transaction in question, while an electronics supplier's control of the retail price set by the retailer to prevent predatory undercutting of prices among retailers was considered a reasonable restriction that does not provide an additional benefit to the supplier. It is unclear what factors the Board took into consideration in arriving at its conclusion that only one of these two examples qualifies as a non-monetary consideration.

JURISDICTION:

Thailand

Tax Exemption for Property Transfers

The government has approved Royal Decree 753, exempting companies and juristic partnerships from income tax, value added tax (VAT), specific business tax and stamp duty arising from the sale of assets, subject to a buy-back provision, to real estate investment trusts (REITs). Trustees of REITs are also exempt from VAT, specific business tax and stamp duty upon redemption of the assets. The measure was approved in order to provide businesses facing temporary liquidity issues, due to the COVID-19 pandemic, an incentive to raise funds using their existing assets. The decree took effect 19 July 2022.

The exemption is subject to the following conditions:

- the sale is in accordance with the rules and conditions set by the Capital Market Supervisory Board;
- the company or juristic partnership sells the asset to the trustee within two years from the date the decree comes into force;
- the company or juristic partnership buys back the asset, and the trustee sells back the asset, within 5 years from the date of the original sale; and
- the company or juristic partnership and the trustee comply with the rules, procedures and conditions to be prescribed in a notification of the Director-General.

Automatic Exchange of Information on Financial Accounts

According to an update of 28 July 2022 published by the OECD, Thailand has joined the Multilateral Competent Authority Agreement on Automatic Exchange of Information Agreement (CRS-MCAA) on the introduction of the automatic exchange of information in tax matters on a reciprocal basis.

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Prior to arriving in Singapore in 1996, he was based in Jakarta and Hong Kong. His practice focuses on advising tax matters such as direct investment, restructurings, financing arrangements, private equity and holding company structures into or from locations such as mainland China, Hong Kong, Singapore, India, Indonesia and the other ASEAN countries.